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No. 88-617

In the Supreme Court of the United States

OCTOBER TERM, 1988

YORK BANK & TRUST COMPANY, PETITIONER

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JORDAN LUKE
General Counsel
Federal Home Loan Bank Board
Washington, D.C. 20552

QUESTION PRESENTED

Whether, when a federally insured savings and loan institution defaults, the Federal Savings and Loan Insurance Corporation is authorized to make federal insurance coverage determinations in the first instance, subject to judicial review under the Administrative Procedure Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 851 F.2d 637. The opinion of the district court (Pet. App. A22-A30) is reported at 663 F. Supp. 1100.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1988. A petition for rehearing was denied on August 1, 1988 (Pet. App. A20-A21). The petition for a writ of certiorari was filed on October 12, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Federal Savings and Loan Insurance Corporation (FSLIC) is a corporate governmental agency responsible, purusant to Title IV of the National Housing Act, 12 U.S.C. 1724 *et seq.*, for insuring depositors' accounts at all federally-chartered savings and loan associations and most state-chartered savings and loan associations. This case arises from the FSLIC's determination to deny petitioner's claim for federal insurance in excess of $100,000 on certificates of deposit (CDs) issued by a failed savings and loan association.

1. Congress has instructed the FSLIC to insure deposit accounts of qualifying savings and loan institutions "except that no member or investor * * * of any such institution shall be insured for an aggregate amount in excess of $100,000" (12 U.S.C. 1728(a)). It also has expressly authorized the FSLIC to promulgate regulations defining various statutory terms and creating classifications and exceptions for determining the extent of insurance coverage (12 U.S.C. 1728(a)). In addition, Congress has directed the FSLIC, in its corporate capacity as insurer of deposit accounts, to pay insured depositors "as soon as possible" after an institution's default (12 U.S.C. 1728(b)). The FSLIC typically does so within days.[1]

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[1] The Federal Home Loan Bank Board (Bank Board), an independent agency in the Executive Branch organized pursuant to the Federal Home Loan Bank Act, 12 U.S.C. (& Supp. VI) 1421 *et seq.*, serves as the operating head of the FSLIC. Congress has given the Bank Board broad discretionary powers over the operation of the savings and loan industry, including the power to appoint the FSLIC as conservator or receiver for a federally-insured savings and loan association, ex parte and without prior court approval, if the Bank Board determines that statutory grounds exist (12 U.S.C. 1464(d)(6), 1729(c)(1)(B)). In addition to providing insurance, the FSLIC thus performs various administrative functions with respect to failed institutions in its separate capacity as a receiver.

The FSLIC's insurance regulations, which are codified at 12 C.F.R. Pt. 564, also establish procedures for the administrative resolution of insurance coverage disputes. If the Director of the FSLIC's Insurance Division determines that all or portions of an account are not insured, he must notify the accountholder and provide the accountholder with a certificate of claim in liquidation that entitles the accountholder to a pro rata share of the receivership assets (12 C.F.R. 564.1(d)(2)). The accountholder may request reconsideration of the initial determination (12 C.F.R. 564.1(d)(3)(i)), and the Director of the FSLIC must either grant or deny the request for reconsideration within 60 days (12 C.F.R. 564.1(d)(3)(iii)(c)). If the request is granted, the Director must issue a final written decision on the accountholder's claim within 180 days (12 C.F.R. 564.1(d)(4)). Finally, Section 564.1(d)(5) of the regulations provides that an accountholder who receives a final agency determination that his account is uninsured (or not fully insured) may obtain judicial review of that determination (12 C.F.R. 564.1(d)(5)).

2. In late 1983, petitioner purchased five CDs with a total face value of $1,241,000 from Empire Savings & Loan Association, a FSLIC-insured institution (Pet. App. A2 & n.1). On March 14, 1984, the Federal Home Loan Bank Board determined that Empire was insolvent and appointed the FSLIC as receiver (*id.* at A2). See note 1, *supra*. The FSLIC, in its separate corporate capacity, determined that petitioner was not entitled to federal insurance in the full amount of the CDs it had on deposit at Empire (*ibid.*). Accordingly, the FSLIC paid petitioner $100,000 and provided it with claim certificates to be presented in the Empire receivership proceedings for the remaining sum (*id.* at A2-A3).

Petitioner then instituted this action in the United States District Court for the Middle District of Pennsylvania

against the Bank Board and against the FSLIC, both in its capacity as receiver for Empire and in its corporate capacity.[2] Petitioner told the district court that it was suing the FSLIC only in its capacity as receiver for Empire and apparently sought to recover the uninsured portions of its accounts out of the assets of the Empire receivership (Pet. App. A27 n.4). Thus, the district court had no occasion to consider whether it had jurisdiction to entertain a claim against the FSLIC in its corporate capacity (*ibid.*). Instead, the district court accepted the FSLIC's position that claims against the receivership estate could be pursued only through the administrative claims process established for the resolution of such claims. See, *e.g.*, *North Mississippi Sav. & Loan Ass'n* v. *Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), cert. denied, 474 U.S. 1054 (1986). Accordingly, the district court granted the FSLIC's motion to dismiss petitioner's action for lack of subject matter jurisdiction (Pet. App. A26-A30).

3. Petitioner appealed the order of dismissal. On appeal, petitioner recharacterized its claim as a challenge to the insurance determination made by the FSLIC in its corporate capacity, rather than a claim against the assets of the Empire receivership. On that basis, the court of appeals, while suggesting its approval of the *Hudspeth* doctrine as applied to suits against the FSLIC in its receivership capacity, concluded that the district court erred in dismissing the action. Pet. App. A3-A5. The court of appeals held that petitioner was entitled to bring suit against the FSLIC in its corporate capacity as insurer of funds deposited with Empire (*id.* at A11). It therefore reversed

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[2] Petitioner also named as defendants two private parties, alleging that they had induced petitioner by fraud and misrepresentation to purchase the CDs. Petitioner settled its dispute with those parties, and they were dismissed from the action (Pet. App. A3 n.2).

the district court's judgment of dismissal and remanded for further proceedings.

The court of appeals also addressed the standard of review under which the district court was to evaluate petitioner's challenge to the FSLIC's denial of insurance coverage. The court concluded that the FSLIC's insurance determinations should be treated as final agency action subject to review under the arbitrary and capricious standard of the Administrative Procedure Act (APA), 5 U.S.C. 706 (Pet. App. A10-A11). Judge Stapleton dissented from that determination (*id.* at A11-A15).

ARGUMENT

Petitioner contends that the court of appeals erroneously instructed the district court to consider petitioner's challenge to the FSLIC's insurance determination under standards set forth in the Administrative Procedure Act. The question of statutory construction that petitioner poses is obviously interlocutory and raises no conflict among the circuits. Furthermore, this Court's pending decision in *Coit Independence Joint Venture* v. *FSLIC*, cert. granted, No. 87-996 (Mar. 7, 1988), though involving a distinct issue, may bear on the eventual outcome of the instant matter. Thus, whatever the merits of petitioner's claim, it does not warrant this Court's review at this time.

It is well settled that this Court does not grant certiorari to review a non-final judgment in the absence of exceptional circumstances. *E.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *American Constr. Co.* v. *Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893). See generally R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* 224-226 (6th ed. 1986). No such

circumstances exist here. The court of appeals' instruction that the district court should consider petitioner's claim under standards set forth in the APA does not involve any threshold jurisdictional issue. Compare *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949). Furthermore, it does not pose an "insuperable obstacle" to petitioner's maintenance of the suit. Compare *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52 (1938). To the contrary, petitioner may qualify for relief under the APA standards. And if petitioner does not so qualify, it may ask the court of appeals to revisit the question and reassess the applicability of the APA standards based on the record established in the district court.[3]

There is also no conflict among the circuits on this question of whether APA review is applicable to FSLIC's insurance determinations. Compare *Hanover Star Milling Co.* v. *Metcalf*, 240 U.S. 403, 408-409 (1916).[4] In fact, the

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[3] Although the district court is bound by the decision of the court of appeals here, the law of the case doctrine would not bar the court of appeals from reconsidering the question after completion of the remand proceedings. See J. Moore, 1B *Moore's Federal Practice* ¶ 0.404[10], at 171-172 & n.11 (2d ed. 1988). And this Court would, of course, retain power to review the question on a subsequent petition for writ of certiorari. See *Hughes Tool Co.* v. *Trans World Airlines Inc.*, 409 U.S. 363, 365 n.1 (1973). Thus, petitioner's interlocutory posture is not dramatically different than if the district court itself had initially determined that the APA standards apply.

[4] Petitioner incorrectly (Pet. 7-8) claims that the court of appeals' decision conflicts with the Ninth Circuit's decision in *Morrison-Knudsen Co.* v. *CHG Int'l, Inc.*, 811 F.2d 1209, 1220 (1987), cert. dismissed, No. 87-451 (Nov. 7, 1988). However, *Morrison-Knudsen Co.* concluded only that the FSLIC, acting as receiver, may not adjudicate creditor claims against an insolvent savings and loan. The court's passing discussion of the FSLIC's role as insurer (811 F.2d at 1218 n.2, 1220) is—at most—dicta and, in any event, contained no mention of whether or not the APA standards are applicable in the in-

FSLIC's insurance determinations have generated relatively little litigation in recent years despite the unprecedented number of thrift failures; instead, the great bulk of the litigation in the present thrift crisis arises from *creditor* claims against failed thrifts. Thus, petitioner vastly overstates the importance of this case.[5]

Petitioner's description of the events below confirms that, even under petitioner's characterization of the case, review at the interlocutory stage would be particularly inappropriate here. Petitioner notes that "[t]he District Court never reached the standard of review of an FSLIC determination and created no record from which the Third Circuit reached its decision" (Pet. 15). Petitioner further asserts that the court of appeals "usurped the function of the District Court and based its decision on a clearly inadequate record" (*ibid.*). Obviously, if the record was inadequate to permit the court of appeals to resolve the standard

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surance context. Petitioner is similarly incorrect in asserting that the Fifth Circuit has "adopted the position of the Third Circuit [in this case]" (Pet. 8). The Fifth Circuit's discussion of the question in *Godwin* v. *FSLIC*, 806 F.2d 1290, 1292 (1987), is also dicta.

Petitioner relies heavily on *Jugum* v. *FSLIC*, 637 F. Supp. 1045 (W.D. Wash. 1986), vacated as moot, No. 87-3517 (9th Cir. July 21, 1987). Such a district court decision with no continuing precedential authority does not suggest that the issue merits the attention of this Court.

[5] The FSLIC is obligated to pay holders of insured deposit accounts "as soon as possible" after an institution's default (12 U.S.C. 1728(b)). For depositors who hold insured accounts containing less than the $100,000 maximum insurable amount, the payment is virtually automatic. Disputes typically arise only when (as here) a depositor claims that he is entitled to an insurance payment in excess of $100,000 or in other unusual circumstances. Thus, petitioner's contention that the court of appeals' decision "will effect the rights of all depositors of failed federally insured savings and loan associations" (Pet. 7) is not accurate.

of review issue, the record would be insufficient for this Court to address that issue as well. Accordingly, if this Court is to address the question at all, it should await a case that presents a satisfactory record for review.[6]

Finally, the pendency of *Coit Independence Joint Venture* v. *FSLIC*, No. 87-996 (argued on Nov. 1, 1988), also weighs against granting review in this case. The issue in *Coit*, which involves the FSLIC's administration of receivership claims, is distinct from the insurance issue here. Nonetheless, the Court's decision in *Coit* may influence petitioner's and the government's ultimate position in this case. We submit that it would be improvident to grant interlocutory review where the position of the litigants may be affected by the Court's forthcoming resolution of a pending case, particularly where, as here, the litigants will have an opportunity to discuss the relevance of the Court's decision in the course of future lower court proceedings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JORDAN LUKE
General Counsel
Federal Home Loan Bank Board

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[6] As we have explained (note 3, *supra*), if petitioner fails to prevail on its claim for relief in district court, it will have an opportunity to ask the court of appeals to reassess the applicability of the APA standards based on the record developed at trial.

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